IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AFFYMETRIX, INC., Plaintiff/Counter-Defendant, v. ILLUMINA, INC., Defendant/Counter-Plaintiff.	C.A. No. 04-901-JJF **REDACTED VERSION**

AFFYMETRIX, INC.'S RESPONSE TO ILLUMINA, INC.'S COUNTERSTATEMENT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF ILLUMINA'S COUNTERCLAIM OF INTENTIONAL INTERFERENCE WITH ACTUAL AND PROSPECTIVE ECONOMIC ADVANTAGE AND PORTIONS OF ILLUMINA'S COUNTERCLAIM FOR UNFAIR BUSINESS PRACTICES; OR IN THE ALTERNATIVE, FOR BIFURCATION

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Original Filing Date: August 4, 2006
Redacted Version Filing Date: August 11, 2006

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INTRODUCTION

Illumina's Counterstatement of Contested Facts in opposition to Affymetrix 's Motion for Summary Judgment does not raise any genuine issues of material fact.

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To overcome this inconsistency, it alleges that Affymetrix had market power and therefore Affymetrix's conduct must be considered distinct from Illumina's. This argument fails because Illumina has not raised a genuine issue of fact as to market power.

Illumina's Counterclaim for Intentional Interference with Actual and Prospective Economic Advantage is premised on two allegations:

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Illumina has adduced absolutely no evidence that Affymetrix caused any of the harm that it alleges it has suffered, and the Court should grant summary judgment of this cause of action.

The Court should also grant summary adjudication of those portions of Illumina's unfair competition claim that allege

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As to the first, there is no evidence that Affymetrix

As to the second, Illumina has not raised a genuine issue of fact that

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ARGUMENT

I. ILLUMINA CONCEDES THAT THE ALLEGED CONDUCT IS NOT ACTIONABLE ABSENT MARKET POWER.

Illumina's Counterstatement of Contested Facts in Opposition to Affymetrix's Motion for Summary Judgment is structured around its opening assertion that "Affymetrix possesses market power in the relevant markets." (D.I. 301 at p. 3). At footnote 4 of its Counterstatement, Illumina states that its own behavior "is distinct from Affymetrix's for purposes of analyzing unfair competition because Illumina neither possesses market power, **REDACTED**

In this footnote, and as seen in its decision to define its counterstatement around market power, Illumina concedes that its allegations that

REDACTED not actionable unless Affymetrix is found to have "market power."

Illumina makes this argument because

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While Affymetrix does not agree that the alleged conduct, even with market power, would be actionable, Illumina's claims fail because it has not raised a triable issue of fact with respect to market power.

II. ILLUMINA HAS FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT REGARDING MARKET POWER.

"To demonstrate market power circumstantially, a plaintiff must (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (citations omitted). If a party claiming monopolization fails to raise a triable issue of fact as to market power, summary judgment of those claims is appropriate. *See, e.g. Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261 (C.D. Cal. 2000) (granting summary judgment as to antitrust claims under the

Sherman Act and as to claims under California Business and Professions Code § 17200 where plaintiff failed to raise a triable issue of fact regarding market power).

Illumina has the burden of defining the relevant market. *Pastore v. Bell Telephone Co. of Pa.*, 24 F.3d 508, 512 (3rd Cir. 1994) (discussing a claim of attempted monopolization under § 2 of the Sherman Act). Moreover, the law requires that a party asserting a violation of Section 2 of the Sherman Act (as Illumina is here) identify the relevant market "with reference to the rule of reasonable interchangeability and cross-elasticity of demand." *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 436-437 (3rd Cir. 1997) (upholding grant of dismissal of complaint because plaintiff failed to plead a valid relevant market).

Illumina's First Amended Answer and Counterclaims mentions "the market for DNA microarray products" (¶¶ 67 – 74), but it does not discuss any of the various solutions that compete in the genetic analysis market, whether and to what extent they are interchangeable, and the cross-elasticity of demand. Illumina's Counterstatement of Contested Facts does not even attempt to define the market in anything but the broadest terms. While Illumina cites the testimony

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This off-hand approach to market definition does not even begin to meet the required legal standard. *See, e.g. Pocono Invitational Sports Camp, Inc. v. National College Athletic Ass'n*, 317 F. Supp. 2d 569, 586-87 (E.D. Pa. 2004) (granting summary judgment of Sherman Act claims upon finding that plaintiff had not plead a relevant market, noting "as we are now at the summary judgment stage, plaintiffs should

have brought forth evidence to support their market definitions"). For this reason alone, Illumina has failed to raise sufficient evidence regarding market power.

Further -- the lack of a market definition aside -- Illumina has failed to adduce sufficient evidence regarding Affymetrix's supposed market domination to defeat summary judgment. It has provided no expert testimony or other independent analysis of this topic. The only evidence Illumina cites in support of its claim is

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That is particularly the case here, where

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Finally, Illumina's cursory allegations that there are barriers to entry in the DNA microarray market are belied by its own success. Illumina earned revenues of $4,103,000 in 2002, the first year that it offered products. (Exh. 39). Since then, Illumina has increased its revenues from $18,378,000 in 2003 to $57,762,000 in 2005. (Exh. 40). *See Carter*, 101 F. Supp 2d at 1267 (finding that plaintiff failed to make an adequate showing of market power, in part because of evidence that plaintiffs "sales have steadily grown while [defendant's] sales have declined.") Moreover.

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III. THE COURT SHOULD GRANT SUMMARY JUDGMENT OF ILLUMINA'S COUNTERCLAIM FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE BECAUSE ILLUMINA HAS NOT PRESENTED SUFFICIENT EVIDENCE THAT AFFYMETRIX'S CONDUCT WAS WRONGFUL OR THAT AFFYMETRIX CAUSED ANY OF ILLUMINA'S ALLEGED HARMS.

A.

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Illumina's Counterstatement of Contested Facts recites

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In order to prevail on a claim of Intentional Interference With Prospective Economic Advantage, Illumina must prove more

it must show that Affymetrix's interference was "independently wrongful," that is, "unlawful, proscribed by some constitutional, statutory, regulatory, common law, or other determinable standard." *Korea Supply v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003).

Illumina's only argument that Affymetrix's efforts to win sales were "independently wrongful" is that Affymetrix had "market power." *See* D.I. 301 at n. 4. However, as discussed above, Illumina has not raised a triable issue of fact with respect to market power.

In addition to proving independently wrongful conduct, Illumina must also prove Affymetrix's conduct proximately caused its economic harm. *Korea Supply*, 29 Cal. 4th at 1153.

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Therefore, Illumina has not raised a triable issue of fact with respect to harm or proximate cause in connection with these sales.

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See Franklin v. Dynamic Details, Inc., 116 Cal App 4th 375, 394-95 (2004) (granting summary judgment; plaintiff's "attempt to establish causation through a temporal sequence" asserting that because "the [defendant's] e-mails preceded [plaintiff's] loss of . . . business, the e-mails caused the loss" was not sufficient to raise a triable issue of fact on plaintiff's business tort and unfair competition claims).

Similarly,

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Illumina's Counterstatement of Contested Facts claims that

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For these

reasons alone, summary adjudication is appropriate as to these portions of Illumina's counterclaims.

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Comparing one's products to the competition is a routine business practice that does not give rise to tort liability as a matter of law. *See Coastal Abstract Serv., Inc. v. First American Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir.1999) (finding as a matter of law that defendant's statements about plaintiff's company did not give rise to liability under the Lanham Act or the California law of defamation)

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IV. THE COURT SHOULD GRANT SUMMARY ADJUDICATION OF ILLUMINA'S COUNTERCLAIMS UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200 THAT ALLEGE FALSE AND MISLEADING STATEMENTS AND

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A. Illumina Has Not Raised A Triable Issue Of Fact With Respect To Its Claim That Affymetrix Made False And Misleading Statements To Customers.

To prevail in a claim for false and misleading statements under California Business and Professions Code §17200, Illumina must prove that "members of the public are likely to be deceived." *Bank of the West v. Superior Court of Contra Costa County*, 2 Cal. 4th 1254, 1267 (1992). "Furthermore, anecdotal evidence alone is insufficient to prove that the public is likely to be mislead . . . to prevail, plaintiff must demonstrate by extrinsic evidence, such as consumer survey evidence, that the challenged statements tend to mislead customers." *Rice v. Fox Broad. Co.*, 330 F.3d 1170, at n.8 (9th Cir. 2003) (granting summary judgment because plaintiff had not adduced the required evidence). Lastly, as discussed above, comparing one's products to the competition is a routine business practice that does not give rise to tort liability as a matter of law. *See*

Coastal Abstract Serv., 173 F.3d at 731.

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C. **Illumina's Other Allegations Should Not Preclude Summary Adjudication.**

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V. ILLUMINA'S COUNTERCLAIMS, TO THE EXTENT THAT THEY SURVIVE, SHOULD BE BIFURCATED FROM THE ACTION SET FOR TRIAL ON OCTOBER 16, 2006.

In its letter to the Court of July 28, 2006, Illumina objects to the bifurcation of its business tort and unfair competition counterclaims on the basis that these claims have been in the case since its outset and that it would therefore be unfair to bifurcate them. (D.I. 303). Illumina's Sherman Act Counterclaim has not been part of this matter since its inception, but was only filed on February 17, 2006. In light of Illumina's decision to premise its business tort and unfair competition counterclaims on Affymetrix's alleged monopolistic conduct, this argument carries little weight.

More importantly, as discussed in Affymetrix's opening brief, bifurcation of the vague counterclaims, to the extent that they survive, will appropriately separate the portions of the case that require evidentiary proofs, reduce jury confusion, and expedite trial. (D.I. 278 at pp. 25–28). Therefore, if the Court does not grant Affymetrix's motion, Affymetrix respectfully requests that the Court bifurcate Illumina's Counterclaims for Intentional Interference with Actual and Prospective Economic Advantage and Unfair Competition from the trial scheduled for October 16, 2006.

CONCLUSION

For the foregoing reasons, Affymetrix respectfully requests that the Court grant summary judgment of Illumina's Counterclaim for Intentional Interference With Actual and Prospective Economic Advantage and Summary Adjudication of the portions of Illumina's Counterclaim for Unfair Competition Under Cal. Business and Professions Code § 17200 that allege false and misleading statements and "publishing" of confidential information.

If the Court does not grant Affymetrix's motion, Affymetrix respectfully requests that the Court bifurcate Illumina's business tort and unfair competition counterclaims from the trial scheduled for October 16, 2006.

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